STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUSTIN EMIL LINDAHL,

Defendant-Appellant.

UNPUBLISHED
March 24, 2005

No. 251170
Kalamazoo Circuit Court
LC No. 03-000407-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KRISTINA MARIE ALLEN,

Defendant-Appellant.

No. 251267
Kalamazoo Circuit Court
LC No. 03-000484-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GEORGE DONALD ELLIOTT,

Defendant-Appellant.

No. 251741
Kalamazoo Circuit Court
LC No. 03-000408-FH

Before: Saad, P.J., and Smolenski and Cooper, JJ.

PER CURIAM.

Codefendants Justin Emil Lindahl, Kristina Marie Allen, and George Donald Elliott appeal as of right in these consolidated appeals. The codefendants were each charged with first-degree home invasion[1] and conspiracy to commit first-degree home invasion.[2] Mr. Lindahl and Mr. Elliott were also charged with assault with intent to do great bodily harm less than murder,[3] while Ms. Allen was also charged with felonious assault.[4] The codefendants were tried in a joint trial and were represented by a single attorney.[5]

In Docket No. 251170, Mr. Lindahl was convicted of all charges and sentenced as a second habitual offender[6] to ten to thirty years' imprisonment for his home invasion and conspiracy convictions and seven to fifteen years' imprisonment for his assault conviction. In Docket No. 251267, Ms. Allen was also convicted of all charges and sentenced to fifty-one months to twenty years' imprisonment for her home invasion and conspiracy convictions and two to four years' imprisonment for her felonious assault conviction. In Docket No. 251741, Mr. Elliott was convicted of first-degree home invasion, but acquitted of the conspiracy and assault charges. He was sentenced to six to twenty years' imprisonment. We affirm.

I. Factual Background

On the evening of July 19, 2002, Mr. Lindahl became involved in an argument with several people while at a visitor at a private apartment. Sam Ring, the primary occupant of the apartment, was not home at the time. Mr. Lindahl became upset and took a picture from the apartment when he left, spilling beer in the process. Later that night, Mr. Ring called Mr. Lindahl and told him to return the picture. When Mr. Lindahl returned to the apartment with Ms. Allen, Mr. Lindahl and Mr. Ring had a physical altercation. Mr. Lindahl and Ms. Allen left the apartment and drove to Mr. Elliott's home. Mr. Lindahl told Mr. Elliott that he had been "jumped" and that he wanted revenge. The trio later returned to Mr. Ring's apartment with several friends. Mr. Lindahl was armed with a tire iron and Ms. Allen and Mr. Elliott were armed with baseball bats. Another participant kicked in the door to Mr. Ring's apartment.[7] The group entered and began fighting with the occupants. Mr. Elliott remained in the hallway outside the door. At one point during the altercation, Mr. Ring attempted to leave the apartment,

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[1] MCL 750.110a(2).

[2] MCL 750.157a.

[3] MCL 750.84.

[4] MCL 750.82.

[5] Jamie Maya was also tried with the codefendants. Mr. Maya was represented by separate counsel and is not a party to these consolidated appeals. Several other participants in the altercation, also represented by separate counsel, entered plea agreements and testified against the codefendants.

[6] MCL 769.10.

[7] Mr. Lindahl attempted to kick in the door, but was unable to as his foot was injured in the previous altercation with Mr. Ring.

but was blocked by Mr. Elliott. Several of the occupants were injured and Mr. Ring received medical attention for a stab wound and head injury.

II. Docket No. 251170

A. Effective Assistance of Counsel

Mr. Lindahl contends that he received ineffective assistance of counsel, as trial counsel failed to raise the defense of insanity. Mr. Lindahl further contends that trial counsel's representation of the three codefendants amounted to a conflict of interest. He asserts that trial counsel failed to raise the insanity defense on his behalf as this defense would be inconsistent with the joint defense raised by the parties.

Absent a *Ginther*[8] hearing, our review is limited to plain error on the existing record affecting defendant's substantial rights.[9] Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise.[10] To establish ineffective assistance of counsel, defendant must prove that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the proceedings would have resulted differently.[11] Defendant must overcome the strong presumption that counsel's performance was sound trial strategy.[12] This Court will not substitute its judgment for that of trial counsel regarding matters of strategy or assess trial counsel's competence with the benefit of hindsight.[13]

Mr. Lindahl first contends that trial counsel should have sought a psychological evaluation and raised an insanity defense on his behalf, as he suffered from clinical depression. Mr. Lindahl also argues that, due to his untreated addiction to alcohol and several illegal substances, he was rendered temporarily insane. We disagree.

Pursuant to MCL 768.21a, the defense of legal insanity may be raised as a defense as follows:

> (1) It is an affirmative defense to a prosecution for a criminal offense that the defendant was legally insane when he or she committed the acts constituting the offense. An individual is legally insane if, as a result of mental illness as defined in . . . the mental health code . . . or as a result of being mentally retarded as defined in . . . the mental health code . . . that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her

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[8] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[9] *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

[10] *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

[11] *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

[12] *Id.* at 600.

[13] *People v Williams*, 240 Mich App 316, 331-332; 614 NW2d 647 (2000).

> conduct or to conform his or her conduct to the requirements of the law. Mental illness or being mentally retarded does not otherwise constitute a defense of legal insanity.
>
> (2) An individual who was under the influence of voluntarily consumed or injected alcohol or controlled substances at the time of his or her alleged offense is not considered to have been legally insane solely because of being under the influence of the alcohol or controlled substances.
>
> (3) The defendant has the burden of proving the defense of insanity by a preponderance of the evidence.[14]

Mr. Lindahl clearly was not entitled to raise an insanity defense based on involuntary intoxication due to his long-term voluntary use of alcohol and drugs. This Court has distinguished between voluntary and involuntary intoxication as follows:

> "Voluntary or self-induced intoxication is 'caused by substances which the defendant knows or ought to know have the tendency to cause intoxication and which he knowingly introduced or allowed to be introduced into his body . . . .' Involuntary intoxication is intoxication that is not self-induced, and by definition occurs when the defendant does not knowingly ingest an intoxicating substance, or ingests a substance not known to be an intoxicant."[15]

A defendant may have a partial defense based on insanity due to involuntary intoxication "when the chemical effects of drugs or alcohol render the defendant temporarily insane."[16] However, there is no evidence on the record to suggest that Mr. Lindahl's substance abuse had such an effect on his mental capacity. Trial counsel was not required to raise a meritless defense.[17] Accordingly, his failure to raise the insanity defense on this ground did not render his assistance ineffective.

Trial counsel was also not ineffective for failing to raise the insanity defense based upon Mr. Lindahl's clinical depression. As noted above, a defendant must establish both that he suffered from a mental illness and that this illness deprived him of substantial capacity either to appreciate the nature and quality or the wrongfulness of his conduct or to conform his conduct to the requirements of the law. "'Mental illness' means a substantive disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life."[18] Even assuming that clinical depression meets the statutory

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[14] MCL 768.21a. See also *People v Carpenter*, 464 Mich 223, 231; 627 NW2d 276 (2001).

[15] *People v Caulley*, 197 Mich App 177, 187; 494 NW2d 853 (1992), quoting *People v Low*, 732 P2d 622, 627 (Colo, 1987).

[16] *Id.*

[17] *Snider*, *supra* at 425.

[18] MCL 330.1400(g). See also *People v Mette*, 243 Mich App 318, 325; 621 NW2d 713 (2000).

definition of "mental illness," Mr. Lindahl has not met his burden of establishing that trial counsel was ineffective for failing to raise an insanity defense. Nothing in the record suggests that Mr. Lindahl's clinical depression affected his ability to appreciate the nature of his actions or to conform his conduct to the law. Accordingly, we reject Mr. Lindahl's challenge to trial counsel's performance on this ground.

Finally, Mr. Lindahl contends that trial counsel's joint representation of the codefendants amounted to a conflict of interest rendering his assistance ineffective. When claiming ineffective assistance due to defense counsel's conflict of interest, prejudice will be presumed only if a defendant shows that an actual conflict of interest adversely affected his lawyer's performance.[19]

Before trial, the prosecution filed a motion to disqualify defense counsel due to a conflict of interest. The trial court denied the prosecution's motion after a three-day hearing on the matter. At the hearing, trial counsel asserted that he had discussed the potential for conflicts and the consequences of joint representation with the codefendants, advised them to speak with outside counsel, and each indicated their desire for his continued representation. Each defendant continued to give the same version of events and, therefore, trial counsel did not believe a conflict existed. The prosecution made a plea offer to Ms. Allen on the record at the hearing. Trial counsel explained the benefits of the plea to Ms. Allen, who expressed her intent to reject the offer. Each codefendant told the trial court that they understood the potential conflict created by the offer to Ms. Allen and expressed their desire to continue with their current attorney. It was not until a post-trial hearing regarding trial counsel's potential conflict of interest in representing the codefendants in sentencing that Mr. Elliott and Ms. Allen expressed a desire for substitute counsel.

MCR 6.005(F) prohibits appointed counsel from jointly representing indigent codefendants. "A defendant who can afford to retain counsel on his own cannot have that right restricted by the courts. Such a defendant has a constitutional right to defend an action through the attorney of his choice."[20] Even though the court rule does not apply to retained counsel, the record indicates that the trial court complied with the requirements of MCR 6.005(F) in determining whether a conflict of interest existed. All three codefendants were advised of the potential for conflicts of interest because of their joint representation and all affirmatively stated that they wished to continue with the joint representation. Mr. Lindahl voluntarily agreed to joint representation on the record after full disclosure, and he has failed to establish that an actual conflict of interest existed that deprived him of the defense of insanity. Accordingly, Mr. Lindahl has failed to establish that he was denied the effective assistance of counsel based on the joint representation.[21]

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[19] *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998).

[20] *People v Portillo*, 241 Mich App 540, 542-543; 616 NW2d 707 (2000), citing Const 1963, art 1, § 13, MCL 600.1430, and *People v Arquette*, 202 Mich App 227, 231; 507 NW2d 824 (1993).

[21] See *id.* at 544.

B. Prosecutorial Misconduct

Mr. Lindahl also asserts that he was deprived of a fair and impartial trial because the prosecutor and two of his witnesses used the term "victim" when referring to the complainants in this case. The trial court allowed the prosecution and its witnesses to use this term over the objection of Mr. Maya's separate counsel. Prosecutorial misconduct claims are reviewed on a case by case basis, examining any remarks in context, to determine if the defendant received a fair and impartial trial.[22]

While a prosecutor may not make a statement of fact to the jury which is unsupported by the evidence,[23] he or she is free to argue the evidence and all reasonable inferences arising from it as they relate to his or her theory of the case.[24] "Victim" is defined as "a person harmed by a crime, tort, or other wrong."[25] In this case, evidence was presented that several occupants of an apartment were injured when a group of people broke into the apartment and attacked them. As there is evidence that the complainants were harmed by a crime, the prosecution is allowed to refer to them as victims. Accordingly, we reject Mr. Lindahl's claimed error.

C. Sentencing

Mr. Lindahl contends that he received a disproportionate sentence, as the trial court failed to consider several factors supporting a downward departure from the sentencing guidelines range and because the trial court imposed the greatest maximum sentence for his home invasion conviction although not required to do so by statute. However, if a defendant's sentence falls within the appropriate sentencing guidelines range, we must affirm.[26] As Mr. Lindahl's sentence fell within the appropriate sentencing guidelines ranges, we may not consider his challenge to its proportionality.

Mr. Lindahl also contends that the trial court erred by considering facts not previously found by the jury in scoring several of his offense variables in violation of the United States Supreme Court's recent decision in *Blakely v Washington*.[27] However, a majority of the Michigan Supreme Court recently decided that *Blakely* does not apply to Michigan's indeterminate sentencing guidelines in which the maximum sentence is set by law.[28] Accordingly, we affirm Mr. Lindahl's sentences.

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[22] *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

[23] *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994); *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), overruled in part on other grounds *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

[24] *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *Schutte*, *supra*.

[25] Black's Law Dictionary (7th ed).

[26] MCL 769.34(1); *People v Babcock*, 469 Mich 247, 256; 666 NW2d 231 (2003).

[27] *Blakely v Washington*, ___ US __; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

[28] *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004) (Justices Cavanagh, (continued…)

III. Docket No. 251741

A. Sufficiency of the Evidence

Mr. Elliott asserts that insufficient evidence was presented to the jury to support his first-degree home invasion conviction. We disagree. In sufficiency of the evidence claims, this Court reviews the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.[29] "[C]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime."[30] Mr. Elliott filed a motion for a new trial based, in part, on this argument. A trial court's denial of a motion for new trial is reviewed for an abuse of discretion.[31]

The elements of home invasion are found in MCL 750.110a(2), which provides:

> A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:
>
> (a) The person is armed with a dangerous weapon.
>
> (b) Another person is lawfully present in the dwelling.[32]

Mr. Elliott was convicted for aiding and abetting the commission of the crime. MCL 767.39 provides:

> [E]very person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.[33]

(…continued)

Weaver and Young concurred with Justices Taylor and Markman, writing for the Court, that Blakely is inapplicable in Michigan).

[29] *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002).

[30] *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

[31] *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

[32] MCL 750.110a(2).

[33] MCL 769.39.

The elements that the prosecutor needed to show to establish aiding and abetting are: (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement which assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that the defendant gave aid and encouragement.[34] An aider and abettor's state of mind may be inferred from all the facts and circumstances. Factors which may be considered include a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime.[35]

In this case, the evidence showed that Mr. Lindahl and four other persons entered Mr. Ring's apartment after knocking down the door and proceeded to attack its occupants. While Mr. Elliott did not enter the apartment, he stood outside the door with a baseball bat. Mr. Ring testified that Mr. Elliott blocked his path when he attempted to leave the apartment. The evidence also showed that Mr. Lindahl told Mr. Elliott that he had been "jumped" and that he wanted revenge. Mr. Elliott then followed Mr. Lindahl and several others to the apartment, armed with the bat, and stood by while someone kicked down the apartment door. The jury could reasonably infer from this evidence that Mr. Elliott knew what Mr. Lindahl intended to do and provided encouragement for the commission of the offense. Accordingly, the prosecution presented sufficient evidence to support Mr. Elliott's conviction and the trial court properly denied his motion for a new trial on this ground.

B. Effective Assistance of Counsel

Mr. Elliott also asserts that he received ineffective assistance of counsel due to trial counsel's joint representation of the codefendants. Mr. Elliott's motion for a new trial was also based on the ineffective assistance of counsel and the trial court held a *Ginther* hearing on the matter. As noted above, Mr. Elliott voluntarily agreed to joint representation on the record at a pretrial hearing. At the *Ginther* hearing, Mr. Elliott admitted that trial counsel told each codefendant that he would withdraw from representing a defendant due to a conflict of interest if one accepted a plea agreement. Mr. Elliott also admitted that he voluntarily declined to accept a plea agreement before trial. As Mr. Elliott voluntarily accepted joint representation on the record and failed to establish that any actual conflict of interest prejudiced the outcome of his trial, we reject his claimed error.

IV. Docket No. 251267

Finally, Ms. Allen also contends that she was denied the effective assistance of counsel due to trial counsel's joint representation of the codefendants. However, as noted above, Ms. Allen voluntarily accepted joint representation after full disclosure on the record. Ms. Allen also rejected a plea agreement presented by the prosecution at the pretrial hearing after being advised by trial counsel of the benefits of such an agreement. As Ms. Allen voluntarily rejected the plea

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[34] *People v Izarraras-Placante*, 246 Mich App 490, 495; 633 NW2d 18 (2001).

[35] *People v Carines*, 460 Mich 750, 757-758; 597 NW2d 130 (1999).

agreement, she cannot establish that the joint representation affected the outcome of her trial. Accordingly, we must also reject Ms. Allen's claim of error.

Affirmed.

/s/ Henry William Saad
/s/ Michael R. Smolenski
/s/ Jessica R. Cooper